

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BERNHARD KUHMSTEDT,

Plaintiff,

- against -

BIRCHBOX, INC.

Defendant.

Docket No. 1:19-cv-8021

JURY TRIAL DEMANDED

COMPLAINT

Plaintiff Bernhard Kuhmstedt (“Kuhmstedt” or “Plaintiff”) by and through his undersigned counsel, as and for his Complaint against Defendant Birchbox, Inc. (“Birchbox” or “Defendant”) hereby alleges as follows:

NATURE OF THE ACTION

1. This is an action for copyright infringement under Section 501 of the Copyright Act. This action arises out of Defendant’s unauthorized reproduction and public display of a copyrighted photograph of the American boy band NSYNC, owned and registered by Kuhmstedt, a professional photographer. Accordingly, Kuhmstedt seeks monetary relief under the Copyright Act of the United States, as amended, 17 U.S.C. § 101 *et seq.*

JURISDICTION AND VENUE

2. This claim arises under the Copyright Act, 17 U.S.C. § 101 *et seq.*, and this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338(a).

3. This Court has personal jurisdiction over Defendant because Defendant transacts business in New York.

4. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b).

PARTIES

5. Kuhmstedt is a professional photographer in the business of licensing his photographs to online and print media for a fee having a usual place of business at Westermuehlstr 3, Munich 80469.

6. Upon information and belief, Birchbox is a foreign business corporation duly organized and existing under the laws of the State of Delaware, with a place of business at 16 Madison SQ West, New York, New York 10010. Upon information and belief, Birchbox is registered with the New York Department of Corporations to do business in New York. At all times material, hereto, Birchbox has owned and operated a website at the URL: www.Birchbox.com (the “Website”).

STATEMENT OF FACTS

A. Background and Plaintiff’s Ownership of the Photograph

7. Kuhmstedt photographed the American boy band NSYNC (the “Photograph”). A true and correct copy of the Photograph is attached hereto as Exhibit A.

8. Kuhmstedt is the author of the Photograph and has at all times been the sole owner of all right, title and interest in and to the Photograph, including the copyright thereto.

10. The Photograph was registered with the United States Copyright Office and was given registration number VA 2-164-958.

B. Defendant’s Infringing Activities

11. Birchbox ran an article on the Website entitled *Are We Wearing White After Labor Day? You Betcha*. See: www.BirchBox.com/guid/article/wear-white-after-labor-day. A

true and correct copy and a screenshot of the Photograph on the Website is attached hereto as Exhibit B.

12. Birchbox did not license the Photograph from Plaintiff for its article, nor did Birchbox have Plaintiff's permission or consent to publish the Photograph on its Website.

CLAIM FOR RELIEF
(COPYRIGHT INFRINGEMENT AGAINST BIRCHBOX)
(17 U.S.C. §§ 106, 501)

14. Plaintiff incorporates by reference each and every allegation contained in Paragraphs 1-12 above.

15. Birchbox infringed Plaintiff's copyright in the Photograph by reproducing and publicly displaying the Photograph on the Website. Birchbox is not, and has never been, licensed or otherwise authorized to reproduce, publically display, distribute and/or use the Photograph.

16. The acts of Defendant complained of herein constitute infringement of Plaintiff's copyright and exclusive rights under copyright in violation of Sections 106 and 501 of the Copyright Act, 17 U.S.C. §§ 106 and 501.

17. Upon information and belief, the foregoing acts of infringement by Birchbox have been willful, intentional, and purposeful, in disregard of and indifference to Plaintiff's rights.

18. As a direct and proximate cause of the infringement by the Defendant of Plaintiff's copyright and exclusive rights under copyright, Plaintiff is entitled to damages and defendant's profits pursuant to 17 U.S.C. § 504(b) for the infringement.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests judgment as follows:

1. That Defendant Birchbox be adjudged to have infringed upon Plaintiff's copyrights in the Photograph in violation of 17 U.S.C §§ 106 and 501;

2. Plaintiff be awarded Plaintiff's actual damages and Defendant's profits, gains or advantages of any kind attributable to Defendant's infringement of Plaintiff's Photograph;
3. That Defendant be required to account for all profits, income, receipts, or other benefits derived by Defendant as a result of its unlawful conduct;
4. That Plaintiff be awarded punitive damages for copyright infringement;
5. That Plaintiff be awarded attorney's fees and costs;
6. That Plaintiff be awarded pre-judgment interest; and
7. Such other and further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all issues so triable in accordance with Federal Rule of Civil Procedure 38(b).

Dated: Valley Stream, New York
August 27, 2019

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